IN THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

Supreme Court, U. S.
FILED.
DEC 14 1910
JAMES H. McKENNEY,
Clerk.

No. 64.

ATLANTIC, GULF & PACIFIC COMPANY,
Appellant and Plaintiff in Error,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF FOR ATLANTIC, GULF & PACIFIC COMPANY,

APPELLANT AND PLAINTIFF IN ERROR.

New York:
Stillman Appellate Printing Co.
1910.

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THE ATLANTIC, GULF & PACIFIC COMPANY against THE GOVERNMENT OF THE PHILIPPINE ISLANDS.	No. 64.

SUPPLEMENTAL BRIEF FOR THE ATLANTIC, GULF & PACIFIC COMPANY, FILED PURSUANT TO LEAVE GRANTED ON THE ARGUMENT.

I.

All the authorities referred to on Respondent's Supplemental Brief are cases of insurance policies.

The present case, however, is not that of a policy of insurance. It is that of a construction contract, in which certain obligations and responsibilities are assumed by the parties, and the interpretation of this contract must be made on the basis of what the

parties intended and not upon the basis of the principles of law applied to insurance policies.

The familiar underlying principle of insurance policies is that the insurer assumes the risk of a certain event entirely irrespective of the acts or conduct of the insured. Thus, in an ordinary policy of fire insurance, the insurer takes the risk of fire whether caused directly by the negligence of the insured or not. In fact, one of the principal objects of taking out a policy of fire insurance is to insure against losses caused by the negligence of the insured. So with marine policies. In the case of *Dudgeon v. Pembroke*, cited on the supplemental brief, the underwriter issued his policy against perils of the sea, and it became immaterial whether the insured (the owner) had sent the vessel to sea in a seaworthy condition or not, and whether such unseaworthiness were a concurrent cause of the loss or not, even a cause without which the perils of the sea would not have brought about the disaster.

II.

The present contract is not a contract of insurance.

It is a contract in which it is provided in substance that, while the contractor shall be generally responsible for damages to the bulkhead and revetment arising from wave action (Article 5) and for small losses of dredged material from the fill (Article 12), nevertheless, the Government shall be responsible for the failure of the bulkheads from inside pressure and for loss of dredged material consequent thereon, to the extent that it shall pay for the repairs.

We believe that it was the meaning of these clauses that the Government assumed the respon-

sibility for the consequences not only of a break in the bulkhead from the inside pressure, but for the loss of fill consequent thereon, as expressly stated in Paragraph 12, and while the complaint is somewhat roughly and inartificially drawn, we believe that it sufficiently states the absence of support of the inside fill for which the Government was responsible as being the real reason why this damage occurred. In other words, the whole theory upon which this contract was based was that the Government would see to it that the bulkhead was sufficient to stand against the inside pressures and prevent the loss of the supporting fill without which it was plain that the bulkhead would not stand. It was an obligation directly imposed upon the Government by the contract that the bulkhead should be sufficient to retain the fill, and when the break took place and the fill was allowed to escape, the consequences of the loss of this fill to the extent of paying for the repairs were to devolve upon the Government.

III.

There is no analogy between the case of Insurance Company v. Transportation Company (12 Wallace, 194) and the present case.

The question is what is the meaning of the contract in suit. In the *Insurance Company* case, the policy stated that "the insurers took the risk of fires caused by lightning, explosions and collisions." The disaster was a fire caused by a collision. Under those circumstances, there could be but one conclusion, namely, that the insurers were responsible. Their responsibility or their freedom from responsibility had nothing to do with the fact that

damages from a collision were at the risk of the owner; their responsibility was entirely due to the fact that the policy stated that they took the risk of fire caused by collision.

The determination of the meaning of the contract in suit rests upon the circumstances surrounding that contract and the language by which responsibility was devolved upon the respective parties; and the clear intention of the contract was to make the Government responsible to the extent of paying for the repairs which were the result of losses of the fill occasioned by a break due to inside pressures.

IV.

It must be remembered that this is a demurrer, and if, upon any theory of the case, there is a possible cause of action stated in the complaint, the demurrer should be overruled.

Even upon the strict principles governing insurance cases, in case of the concurrence of two causes of loss, one insured against by A and the other by B, if the damage caused by each can be discriminated, it must be borne proportionately. See the statement of this principle in *Insurance Company v. Transportation Company*, 12 Wallace, 194, at p. 196, where it is quoted with approval from Phillips on Insurance.

As the Government admitted in Col. Fisk's telegram (Transcript, p. 16) that there was some part of the damage for which the contractors were not responsible, the plaintiff here should in any case be allowed to show that a part, if not all, of the damage lay at the door of the Government. Col.

Fisk's phrase, "For most of typhoon damage I hold contractors responsible," is, in fact, a part of the complaint, being in Exhibit E, attached thereto, and constitutes an admission of separable damages and of partial responsibility on the part of the Government, which the plaintiff should be allowed to prove.

Dec. 9, 1910.

JAMES RUSSELL SOLEY,
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Plaintiff-in Error.

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APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Memorandum Brief for the Atlantic, Gulf & Pacific Company in Reply.

I. THE EFFECT OF THE PROVISIONS OF ARTICLE 5.

It is perhaps true that neither the insurance cases nor the cases in tort cited on appellant's first brief present a complete analogy to the circumstances of this case, and the same is doubtless true of the similar cases cited on the respondent's brief. This is not a case where A had insured against wave ac-